

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2016AP1324-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2011CF1318

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFF ALLEN COLEMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Jeff Coleman appeals a judgment convicting him of fifth-offense operating a motor vehicle while intoxicated. He contends the circuit court should have granted his motion to suppress evidence obtained as a result of the traffic stop. Coleman argues: (1) the doctrine of issue preclusion

applies based on a 2009 decision suppressing evidence arising from the same traffic stop; and (2) the arresting officer lacked sufficient grounds for performing the traffic stop. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 In 2009, officer Michael Luberda stopped Coleman's pickup truck to investigate what Luberda believed to be a drug transaction. Luberda recognized the odor of intoxicants emanating from Coleman, leading to field sobriety tests and a blood test that resulted in a finding of 0.129% blood alcohol content. Coleman filed a motion to suppress evidence based on an illegal stop. When Luberda failed to appear at the suppression hearing, Judge William Atkinson granted the motion to suppress the evidence, concluding the State was unable to meet its burden of going forward. The State then moved to dismiss the complaint and the court granted the motion.

¶3 In 2011, the State refiled the complaint and Coleman again filed a motion to suppress the evidence, arguing issue preclusion and lack of sufficient basis for the traffic stop. Judge Donald Zuidmulder rejected the issue preclusion argument and held a suppression hearing at which Luberda testified. Luberda characterized the area he was patrolling as a high-crime neighborhood associated with drug distribution and gang activity. Luberda had received training from other officers on what to watch for when investigating drug trafficking and had participated in controlled buys of drugs in that area with the Brown County Drug Taskforce. During his training, he had observed drug transactions between persons on the street and persons inside vehicles. Based on his training and experience, he testified that numerous drug arrests occurred in that area, typically involving people with multiple little bags of drugs for sale.

¶4 On the night in question, shortly after 10:00 p.m., Luberda first observed Coleman’s truck, which caught his attention because of “just how slow[ly] it was rolling in the area.” Shortly thereafter, Luberda again saw the truck driving very slowly, and he thought the driver was “maybe lost or looking for something.” Luberda returned to the area where he first saw the truck and observed it from a distance. He saw a person walk to the driver’s side window from behind. That person made brief contact with the driver lasting fifteen to thirty seconds. Based on his training and experience, Luberda believed a drug transaction had taken place, leading him to stop Coleman’s truck.

DISCUSSION

¶5 Coleman first argues the circuit court improperly refused to apply issue preclusion. Determining whether issue preclusion applies involves a two-step process. First, this court must determine whether an issue or fact was actually litigated, which is a question of law that we review de novo. *Estate of Rille v. Physicians Ins. Co.*, 2007 WI 36, ¶37, 300 Wis. 2d 1, 728 N.W.2d 693. Only if this first step is satisfied must the court determine whether application of issue preclusion comports with fundamental fairness. *Id.*, ¶38.

¶6 We need not consider the second step because we conclude the issue of the validity of the traffic stop was not actually litigated in the 2009 proceeding. Judge Atkinson did not address the merits of Coleman’s motion, and he based the decision to suppress the evidence on Luberda’s failure to appear at the hearing. Issue preclusion applies only when facts or issues have been “actually litigated and decided in a prior action.” *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995).

¶7 This case is comparable to *State v. Miller*, 2004 WI App 117, ¶¶18-23, 274 Wis. 2d 471, 683 N.W.2d 485, where this court declined to apply issue preclusion to prevent an expert from testifying to Miller's blood alcohol content when the initial determination to bar that testimony was based on a discovery violation. We concluded then, as now, that exclusion of the evidence had not been actually litigated in the earlier proceeding. *Id.*, ¶23.

¶8 We also conclude the circuit court properly denied Coleman's motion to suppress evidence based on his claim of an unlawful stop. When reviewing the denial of a motion to suppress, we uphold the circuit court's findings of fact unless they are clearly erroneous. *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). Whether those facts satisfy the constitutional requirement of reasonableness is a question of law that we decide de novo. *Id.* The officer's decision to stop the vehicle must be based on specific articulable facts and reasonable inferences from those facts. *Id.* at 430. This court must examine the facts leading up to the stop to determine whether, from the standpoint of an objectively reasonable police officer, the facts amount to a reasonable suspicion. *Id.* at 423-24.

¶9 The nature of the neighborhood, Luberda's training and experience, and the activities he observed around Coleman's truck established Luberda's reasonable suspicion that Coleman engaged in a drug transaction. Luberda described the area as a high-crime neighborhood where numerous drug arrests had been made, typically involving people selling small bags of drugs. That the stop occurred in a high-crime area is a relevant contextual consideration. See *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). The transaction occurred shortly after 10:00 p.m. in a dark location. Although Luberda had been a police officer for only two years, his training included specific instruction and experience regarding drug

transactions and “short-period transactions.” He had witnessed drug transactions involving people on the street and other persons inside a vehicle, and he was part of the arrest team that would actually stop and arrest those people. Luberdá’s observations of Coleman’s specific behavior reasonably suggested a drug transaction. Luberdá was not required to eliminate any innocent explanation for Coleman’s extremely slow driving and brief contact with a pedestrian through the car window. *See State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

¶10 Coleman contends the nature of the neighborhood and Luberdá’s observations were similar to those in *Young*, where the evidence was suppressed. *Young* is factually distinguishable because it involved different contextual circumstances. In *Young*, the transaction took place during the day, the officers’ observations were brief, and the officer who stopped *Young* did not personally observe Young’s conduct and was not even certain that Young actually had contact with the other person. *Id.* at 421. In *Young*, the “short-term contact” was merely two people meeting briefly on the street with no evidence that they engaged in any physical contact. *Id.* at 423, 425.

¶11 The facts of this case more closely resemble those in *State v. Allen*, 226 Wis. 2d 66, 593 N.W.2d 504 (Ct. App. 1999). In *Allen*, this court upheld a *Terry* stop based on the reputation of the neighborhood for drug dealing and gang activity, and on the officer’s observations of an interaction between Allen and another person, even though the officer did not see Allen and the other man exchange anything. *Id.* at 68. In *Allen*, the officer testified that a person getting into a car for a short period of time was consistent with drug trafficking, comparable to Luberdá’s testimony in this case describing a short meeting between Coleman and a pedestrian at his driver’s side window. *See id.* at 74. We

conclude the totality of the circumstances provided Luberda with reasonable suspicion to support his decision to stop Coleman's truck.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited except as provided under RULE 809.23(3) (2015-16).

